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No. 88-1725

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

JUAN FRANCISCO VENEGAS,
*Petitioner,*
*vs.*
MICHAEL R. MITCHELL,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Should an attorney in a successful civil rights case be allowed to collect a contingent fee, where the amount of the fee and the terms of the fee contract have been found by the trier of fact to be both reasonable and permissible by governing ethical standards?

Did Congress, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988, ("the Act") intend to add recovery of statutory fees to the already existing system of contingent fee agreements without preempting state law and without abrogating enforceable written contracts?

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*Respondent.*

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

## STATEMENT OF THE CASE

The respondent, Michael R. Mitchell ("Mitchell"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Ninth Circuit in this case. The decision is reported at 867 F.2d 527 (9th Cir. 1989).

This case involves little more than the complaints of a disgruntled client who voluntarily entered into a standard contingency fee contract. There is no true conflict among the circuits on this question. Contingency fee contracts are extensively regulated by state and local bar associations and state contract law, and enforcement of a private fee agreement is consistent with prior Supreme Court decisions.

Attorney Mitchell successfully represented Venegas in his Section 1983 action against Long Beach, California police officers who used perjured evidence to convict Venegas of murder. Venegas spent two and one half years in prison for the conviction.

Three months prior to a scheduled trial date, Mr. Venegas' previous attorney (his third attorney in the case) advised Mr. Venegas that he would no longer represent him and to find another lawyer.

Against this backdrop, Mr. Venegas signed a written fee agreement, under which attorney Mitchell would be paid, if successful, 40% of any amount recovered, less a $10,000 retainer. The agreement is reproduced at Appendix A hereto. The agreement required Mitchell to apply for statutory fees and to offset any such recovery against his 40% contingent share. The agreement also expressly covered only legal services rendered by Mitchell through trial, leaving it to the parties' mutual agreement whether to continue the attorney-client relationship in the event of a mistrial or an appeal. In the event the case was lost, Mitchell was to receive no further fee at all.

Thereafter, Venegas consented to Mitchell's association of co-counsel, with attorney fees to be divided on a 50-50 basis.

After a jury trial, Mitchell obtained a $2.12 million verdict for Venegas. Pursuant to the fee agreement, Mitchell then made a Section 1988 motion for attorney's fees, and his client was awarded $117,000, of which $75,000 was for Mr. Mitchell's services. However, under the privately-negotiated fee contract, Mitchell was entitled to the contingent fee, minus the $10,000 retainer fee. An appeal was taken by defendants, but Venegas declined Mr. Mitchell's offer to represent him for an additional 10 percent of the recovery and substituted in other counsel. The Ninth Circuit affirmed the jury



verdict and court awarded attorney's fees. *Venegas v. Skaggs*, 831 F.2d 1514 (9th Cir.1987).

This Petition arises from Mitchell's motion to intervene for the purpose of confirming a lien for fees owed under the contingent fee agreement. Venegas opposed the motion, claiming Mitchell was entitled only to the statutory fee. In deciding the motion, the district court reviewed the fee contract. Although the court denied Mitchell's motion to intervene, it declined to invalidate the contingent fee agreement and left any remaining dispute to be resolved in a contract action in state court. In its decision, however, the district court specifically found that the contract was reasonable, did not result in a "windfall" to which Mitchell was not entitled, and was permissible under governing ethical standards, which in this case included the Rules of Professional Conduct of the State Bar of California. The district court also noted Mitchell's "exceptionally competent performance" in the trial.

Both Mitchell and Venegas appealed the district court's order regarding the status of the contingent fee agreement. On January 31, 1989, the Ninth Circuit reversed the district court's denial of Mitchell's motion to intervene and affirmed the district court's ruling that Mitchell's entitlement to attorney's fees was not limited to the Section 1988 award and that the 40% contingent fee was reasonable. The case was remanded to the district court with the strong suggestion that it exercise its ancillary jurisdiction to determine fees.

In the meantime, the underlying case has been settled with the City of Long Beach paying in excess of $2 million, and with Venegas refusing to pay Mitchell any fee whatsoever, statutory or otherwise.

Mitchell seeks only that to which he is entitled by legal contract as reviewed by the courts: attorney's fees

for successfully representing a client who now refuses to honor his financial obligations.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I

### THE CASE IS NOT RIPE FOR REVIEW BECAUSE THE JUDGMENT BELOW WAS INTERLOCUTORY

This case is not ripe for review because the judgment below is interlocutory. The Ninth Circuit remanded the matter to the district court. No inconvenience or embarrassment to any party would result from the denial of certiorari at this point, so this Court should not issue its writ. *American Construction Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384, 13 S.Ct. 758, 763 (1893). Each party will have an opportunity to seek appropriate review after final judgment.

### II

### THERE IS NO TRUE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL ON THIS ISSUE

The purported intercircuit conflict on the issue of contingent fee agreements is illusory.

Petitioner relies heavily on the Tenth Circuit's opinion in *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983). However, the *Cooper* decision was founded on the assumption that statutory fees belonged to and would be awarded to the attorney. As shown *infra*, p. 17, *Evans v. Jeff D.*, 475 U.S. 717, 89 L.Ed.2d 747, 106 S.Ct.



1531 (1986) has shown that assumption to have been erroneous.

First, the Tenth Circuit itself has subsequently limited the *Cooper* decision. *See Sears v. Atchison, Topeka & Santa Fe Railway Co.*, 779 F.2d 1450 (10th Cir. 1985). In *Sears*, plaintiffs' counsel had a retainer agreement that provided counsel would recover 40% of all monetary recovery. After two appeals and two denials of certiorari, judgment of $4.1 million for plaintiffs was affirmed. Plaintiffs then petitioned for relief from their fee contract obligations, relying on *Cooper*. The Tenth Circuit refused to apply *Cooper* retroactively to govern a contract made before the *Cooper* decision, noted that *Cooper* has been criticized by other courts, and stated that the *Sears* fee agreement was enforceable because the contract language differed from the contract at issue in *Cooper*. The Tenth Circuit in *Sears* rejected the argument that the 40% retainer resulted in a windfall to plaintiffs' counsel, noting that the fee agreements were "freely, willingly and knowingly entered into prior to the litigation."

Second, petitioner's attempt to create a conflict where none exists is nowhere more clear than in his citation to *Pharr v. Housing Authority*, 704 F.2d 1216 (11th Cir. 1983). Petitioner implies that *Pharr* is still good authority and that this decision adds "to the confusion in the Circuits." Cert. Petition at p. 8. However, *Pharr* has been overruled by *Blanchard v. Bergeron*, ___ U.S. ___, 109 S.Ct. 939 (1989). In *Pharr*, the Eleventh Circuit found that if a contingent fee agreement was reasonable, then the *defendant* was liable for the greater of the statutory fee or the contingent fee amount. This holding is contrary to this Court's recent decision in *Blanchard*, where the Court plainly stated that "[t]he defendant is not, however, required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee

calculated in the usual way." 109 S.Ct. at 944. Both courts below found Mitchell's fee was reasonable.

Third, neither *Sullivan v. Crown Paper Board Co., Inc.*, 719 F.2d 667 (3rd Cir. 1983) nor *Wheatly v. Ford*, 679 F.2d 1037 (2d Cir. 1982) establish a true Circuit Court conflict. Both cases merely state that plaintiff should pay his or her attorney either the statutory fee or the contingent fee, whichever is greater. *Sullivan*, 719 F.2d 670. Petitioner mischaracterizes the language in *Wheatley*, which only provides — consistent with all other Circuits — that statutory fee should be applied as a credit to the contingent fee, if the contingent fee is greater. *See Wheatley*, 679 F.2d a: 1041 ("Counsel is entitled by the terms of [the fee] contract to 40% of the final recovery. . . . [W]e hold that, *to the extent* counsel receives payment of the section 1988 statutory award, his claim for services rendered under his fee agreement with his client shall be deemed paid and satisfied.") (emphasis added). *Wheatley* simply holds, in using the word "to the extent" rather than the word "if," that no double recovery of fees is allowed.

All of the cases cited by petitioner — with the sole exception of the Ninth Circuit's decision herein — were decided before this Court's opinions in *Blanchard v. Bergeron*, __U.S.__, 109 S.Ct. 939 (1989), *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 107 S.Ct. 3078 (1987) ("*Delaware Valley II*"), *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494 (1987), and *Evans v. Jeff D.* 475 U.S. 717, 89 L.Ed.2d 747, 106 S.Ct. 1531 (1986). As discussed below, each of these decisions supports the enforceability of the private contractual agreement between attorney and client in the context of statutory fee cases.

In summary, the cases on which petitioner relies have lost their authority by reason of intervening decisions of the Supreme Court.



## III

## ENFORCEMENT OF RESPONDENT'S FEE AGREEMENT IS CONSISTENT WITH SUPREME COURT DECISIONS

In each of three recent decisions addressing issues arising under fee-shifting statutes, this Court has acknowledged the viability of fee agreements privately negotiated by plaintiffs and their attorneys. In *Crawford Fitting*, the right to privately contract for fees was preserved. In that case, the Court limited reimbursement to a prevailing party for expert witnesses to $30.00 per day. Accordingly, a federal court is bound by the limits of 28 U.S.C. §§ 1821 and 1920 "absent explicit statutory or contractual authority to the contrary." *Id.* at 390, 393.

Likewise, in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 107 S.Ct. 3078 (1987), the Court stated that "the fee contract between the client and his attorney should be taken into account when determining the reasonableness of the award. . . ." *Delaware Valley, supra* at 3085. *See, also, Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N. D. CA 1974), *aff'd.* 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounas*, 436 U.S. 547 (1978). In its discussion of the nature of Section 1988, the Court in *Delaware Valley* also noted that because a losing plaintiff is entitled to no fees, his or her attorney will be paid nothing unless "the attorney has an agreement with the client that the attorney will be paid, win or lose." *Id.* at 3081.

In *Blanchard v. Bergeron*, __ U.S. __, 109 S.Ct. 939 (1989) this Court again reaffirmed the viability of private contingent fee agreements by holding that a district court cannot limit the court-awarded attorney's fees to an amount provided in a contingency fee

agreement between a prevailing party and his or her attorney. Thus, "a contingent fee agreement is not a ceiling upon the fees recoverable under Section 1988," *Id.* at 946, and a private agreement may be a factor in determining the reasonableness of court-awarded fees. *Id.* at 944. However, *Blanchard* also makes it clear that a prevailing party and his or her attorney can contractually agree to a higher fee than the statutory award, and that will not alter the losing party's obligation to pay court-awarded fees. *Id.* at 945. Thus, petitioner's appeal at page 13 of his brief to "balance the scales" by invalidating all contingency fee agreements is empty rhetoric. *Blanchard* has, in fact, already equalized the equation. Defendants in civil rights cases are only liable for the amount of the statutory fee award, no more no less, regardless of the private contract between client and attorney.

Moreover, petitioner has taken out of context and misconstrued one sentence of this Court's dictum in an effort to transform *Blanchard* into a case upholding the right of a disgruntled client to breach a private contractual agreement with his or her attorney. Petition, p. 11. Despite petitioner's attempt, *Blanchard* remains a case concerned primarily with the fee obligations imposed by a court on a losing party by virtue of Section 1988.

Finally, although this Court did not directly address the issue of contingent fee agreements in *Evans v. Jeff D.*, 475 U.S. 717, 89 L.Ed.2d 747, 106 S.Ct. 1531 (1986), implicit in its determination was an acknowledgment of the validity of private fee agreements. In *Jeff D.*, this Court held that Section 1988 does not require a district court to disapprove a stipulation seeking to settle a case which is expressly conditioned on the prevailing party's waiver of attorney's fees. Reviewing Congressional intent, the Court observed, "[Congress] did not prevent the party from waiving this eligibility



[for attorney's fees] anymore than it legislated against assignment of this right to an attorney. . . ." *Id.* at 730-31. The Court added that while "Congress expected fee-shifting to attract competent counsel to represent citizens deprived of their civil rights, it neither bestowed fee awards upon attorneys nor rendered them *nonwaivable or non-negotiable*." (emphasis added) 475 U.S. at 731-32. As such, if the right to apply for or collect statutory fees can be used by the *client* as "a bargaining chip" to be waived to negotiate an advantageous settlement, then it would be an anomalous result to prevent a prevailing attorney from seeking to enforce a private fee agreement — whether hourly, contingent or otherwise. Surely, if a fee contract is viable after a *Jeff D.* waiver of fees, it must be equally enforceable after a successful trial on the merits which occurred here. *See, Venegas v. Mitchell*, petitioner's Appendix, p. A-15.

## IV

## THE LEGISLATIVE HISTORY OF THE ACT SHOULD NOT BE CONSIDERED, BUT EVEN IF IT IS CONSIDERED, IT DOES NOT SUPPORT PETITIONER'S CONSTRUCTION OF THE LAW

Petitioner has postulated that the legislative history of the Act supports petitioner's interpretation of the holdings in *Cooper* and *Wheatley*. To the contrary, the clear language of the statute, as well as its legislative history, belie this view.

It is a fundamental rule of statutory construction that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to

enforce it according to its terms." *Caminetti v. U.S.*, 242 U.S. 470 (1917). If the language is unambiguous, it is inappropriate to resort to legislative history to interpret the statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

Just weeks before the Act was enacted, Congress passed the Antitrust Civil Process Act amendments of 1976. During the debates on that legislation, Congress focused considerable attention on the availability of contingency fees for private attorneys. Both the House and Senate ultimately agreed expressly to prohibit private attorneys from collecting contingency fees based on a percentage of monetary relief unless the award of fees is determined by a court. *See*, 15 U.S.C. Section 15g(1)(A) and (B).

In contrast to the contingent fee prohibition in the antitrust amendments, Congress included no limitation on private fee contracts in Section 1988. In *Crawford Fitting Co. v. J.T. Gibbons*, Inc., 482 U.S. 437, 96 L.Ed.2d 385, 391, 107 S.Ct. 2494 (1987), the Court held that Congress had enacted 28 U.S.C. Section 1821 as a limitation on the amount of reimbursement a district court may award to a prevailing party for expert witness fees. Thus, Justice Rehnquist aptly observed, "[i]t is . . . clear that when Congress meant to set a limit on fees, it knew how to do so." Likewise, Congress unquestionably knew how to place limits on the availability of fees under a private contingency fee contract, but it did not do so when it passed the Civil Rights Attorney's Fees Awards Act. Petitioner cannot now impute such limitation in the absence of an expression of clear Congressional intent.

Even if reference is made to the legislative history of Section 1988, it readily demonstrates that the primary purpose of the Fees Act was "the promotion of respect for civil rights" rather than the imposition of limits on



attorney's fees, as petitioner suggests. *See, e.g.*, S. Rep. No. 94-1011, p. 5 (1976); *Evans v. Jeff D.*, 475 U.S. 717, 731-32, 89 L.Ed.2d 747, 106 S.Ct. 1531 (1986). According to the chief proponents of the legislation, the impetus for enacting the Fees Act was to restore the status quo after the Supreme Court decided in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that attorney's fees could not be awarded under the Reconstruction Civil Rights Acts in the absence of a specific authorizing statute. *See, e.g.*, Senate Report No. 94-1011, pp. 1, 4, 5; House Report No. 94-1558, pp. 2, 3, 9. The scant commentary cited by petitioner as criticism of attorneys seeking fees for their work pales in comparison to the strong emphasis Congress placed on encouraging meritorious civil rights actions. It is surely not enough to overcome the extensive other legislative history and statutory language to the contrary.

## V

## CONGRESS NEVER INTENDED TO PREEMPT EXTENSIVE STATE LAW ESTABLISHING THE VALIDITY AND GOVERNING THE REASONABLENESS OF CONTINGENT FEE CONTRACTS

In support of petitioner's argument regarding Congressional intent, he cites the Senate Judiciary Committee Report for the proposition that "citizens must have the opportunity to recover what it costs them to vindicate [their civil rights] in court." (Petition, p. 8.)

This sentence in the Report is founded on the mistaken assumption that most, if not all, civil rights clients are able to and do pay their lawyers on an hourly basis as the case proceeds. If civil rights clients were able to

do this, they would have no difficulty finding lawyers financially able to represent them. The true facts are that civil rights clients are generally not able to pay an hourly attorney fee or are not able to attract an attorney able to represent them on a contingency basis because of the relatively minor damages or equitable relief sought.

Petitioner also cites remarks of Senator Tunney. (Petition, p. 9.) However, Congress knew, as Senator Tunney must have known, that nonlawyers cannot normally act as "private attorney's general." In civil rights cases, lawyers, not nonlawyers, enforce the law. Lawyers in the Civil Rights Division of the U.S. Department of Justice, pursuant to guaranteed government salaries (with no obligation to pay overhead) enforce the civil rights laws. No one expects these government lawyers "to pay for the privilege of enforcing the law." Nor should anyone expect private lawyers such as respondent to pay for the privilege of enforcing the law. And the burden is truly on private lawyers, not their clients, to bear the substantial overhead of operating a law office while they seek to vindicate the public right, and when, unlike government lawyers, they receive no payment if they fail to succeed.

Thus, it is clearly a questionable exercise to rely upon a single sentence in one branch of Congress' report, and the remarks of one Senator to ascertain Congressional intent in enacting a statute. *See, e.g., Blanchard v. Bergeron*, __ S.Ct. __, __ L.Ed.2d __, __ U.S. __(1989) (Concurrence of Justice Scalia).



## VI

## RESOLUTION OF THE FEE CONTRACT ISSUES RAISED BY PETITIONER REQUIRES FACT SPECIFIC ANALYSIS THAT WILL FREQUENTLY INVOLVE CASES WITH BOTH STATE LAW AND FEDERAL CIVIL RIGHTS CLAIMS

The issues raised by petitioner involve fact specific matters of contract interpretation and ethical principles that are best left to the extensive enforcement mechanisms already in place among local, state and national bar associations, state regulatory provisions, and fee arbitration panels which routinely regulate attorney-client fee disputes. Petitioner claims that two of the issues presented herein involve: (1) the attorney's fiduciary duty to the client regarding disclosure of fee provisions; and (2) whether a federal court can enforce a contingent fee contract contrary to public policy as stated by the state court.

These arguments were either not presented to the Ninth Circuit, or were not clearly enough presented to merit mention in the Ninth Circuit's opinion, and the facts of record will not support a determination of these questions by this Court. They await evidentiary determination on remand.

Second, even if petitioner had adequately presented these arguments on appeal, neither supports petitioner's request for certiorari. The issue regarding fiduciary obligations is not briefed by petitioner and the petition is devoid of any suggestion that there is a Circuit Court conflict on this issue. The last question which petitioner identifies regarding enforcement of a contingent fee agreement that is purportedly "contrary to the public

policy as expressed by the highest court in the state in which the court sits," Petition at i, is a nonissue. Petitioner cites no authority for this proposition, and the only California cases cited have no application to the facts of this case. Instead, petitioner's California cases address the availability of quantum merit recovery for the attorney who is discharged prior to the contingency — a situation not at issue here, because Mitchell represented Venegas until the contingency in the agreement was satisfied, to wit, he prevailed at the trial.

However, petitioner is correct in noting that state law will frequently need to be referenced in civil rights fee contract cases. For example, in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), plaintiffs prevailed on both their federal claims and their state law negligence claims. *Id.* at 564. Had plaintiffs' counsel wished to enforce a fee contract in that case, the Tenth Amendment would require that the fee contract based on the state law tort causes of action be governed and enforced in accordance with state law. The same would be true with discrimination cases in California, where the state legislature has enacted state statutes prohibiting discrimination in employment, housing and public accommodations and services. *See* Cal. Govt. Code, Section 12940, *et. seq.*; Cal. Civil Code, Section 51. Other pendent state claims are often included in federal civil rights cases in California, including intentional infliction of emotional distress predicated on a discrimination theory. *See, e.g., Agarwal v. Johnson*, 25 Cal.3d 932 (1979) (intentional infliction of emotional distress based on racial epithets); *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493 (1970) (supervisor shouting epithets to plaintiff). In these cases involving both federal and state discrimination causes of action, the California courts would have the right to determine and regulate the attorney's fees contract questions in accordance with local and state bar professional rules of responsibility,



California contract law, and the fee contract provisions of the California Business & Professions Code.

As petitioner's reference to state law indicates, the predominate interest of the states in regulating fee contracts supports denial of the petition for certiorari.

## VII

## CONGRESS DID NOT PREEMPT STATE AND LOCAL AUTHORITY

> "It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms. (citation omitted) Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' (citations omitted) Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,'

> (citation omitted), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' (citation omitted)" *Pacific Gas & Electric Company v. State Energy Resources Comm'n* (1983) 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752.

First, Congress never inserted any express terms in amending Section 1988 preempting state laws validating or regulating contingent fee agreements.

Second, the scheme of Section 1988 is not so pervasive as to make reasonable the inference that Congress left no room for states to allow their inhabitants and members of their bars the historic right to enter into and enforce contingent fee agreements in federal civil rights actions. The Civil Rights Attorney's Fees Awards Act does not touch a field in which the federal interest is so dominant — the validity and reasonableness of contingent fee agreements — that the federal system will be assumed to preclude enforcement of state laws on that subject. The Act validates fee-shifting for prevailing plaintiffs in an effort to assure they obtain competent counsel. Precluding enforcement of state laws on contingent fees does nothing to assure, and in fact undermines, the ability of fee-indigent clients to obtain counsel.

The object sought to be obtained by the federal law (that victims of civil rights violations with only equitable or small monetary claims obtain competent counsel) and the character of obligations imposed by it (that fee-shifting occur when the victim prevails) reveals that the state laws respecting contingent fee agreements have a different purpose: to assure that all fee-indigent persons who have civil rights or other claims of potentially substantial monetary value are able to obtain an attorney.



Third, the state law here does not conflict with federal law as interpreted by *Evans*. State law enshrines the right of an attorney and client, free of coercion, to contract that the client will pay the attorney a percentage only out of the *res* recovered. Federal law provides that the client will be paid (upon prevailing) — or may waive to achieve settlement — by the offending defendant a reasonable amount, denoted an "attorney's fee" to achieve the *Evans* goal of settling cases, or, if the fee is actually extracted from the defendant, to motivate the defendant to stop violating civil rights. It is not physically impossible for the attorneys and the parties to comply with both state law respecting contingent fees and the federal fee statute. Nor do the state contingent fee laws stand as any obstacle to enforcement of Section 1988. Indeed, the state laws harmoniously supplement Section 1988 insofar as they provide at least some means of payment for attorneys in the face of burgeoning client fee waivers.

Respondent Mitchell has suffered these fee waivers on numerous occasions. *See, e.g. Mitchell v. Los Angeles*, 753 F.2d 86 (9th Cir. 1985); *Willard/Mitchell v. Los Angeles*, 803 F.2d 526 (9th Cir. 1986). ("[In *Evans*] the Supreme Court held that Section 1988 vests the right to 'attorney's fees' in the 'prevailing party' rather than his attorney. *Id.* 106 S.Ct. at 1538-40, n. 19. It follows that an attorney has no standing under Section 1988 to seek attorney's fees on his own behalf." 803 F.2d at 527.)

It is inconceivable that Congress would have intended to make the district court's orders respecting Section 1988 fees preemptive of state, local, and federal bar regulation of contingent fee agreements. This would place intolerable burdens on attorneys.

For example, the U.S. District Court for the Central District of California has adopted the Rules of Professional Conduct of the State Bar of California as the standard of professional conduct for the district court. Local Rule 2.5.1. Cal. Rule of Professional Conduct 4-200 prohibits attorneys from entering into "an agreement for ... an ... unconscionable fee," and recites eleven factors to be considered in determining the conscionability of a fee, including whether "the fee is fixed or contingent." Thus, an attorney might properly contract for a reasonable contingent fee under state law, adopted by the local federal court, only to have the fee declared unconscionable or unreasonable by a different federal standard, subjecting the attorney to state bar and local federal bar discipline.

In sum, there is no evidence that Congress intended Section 1988 to be the exclusive vehicle for payment of civil rights attorneys. If that had been intended, the statute would say so and it does not.

## CONCLUSION

This case involves a private contract made and performed in California. The client received precisely what he bargained for at arms length: the professional services of a skilled, experienced trial lawyer. In fact, Mitchell performed a superior job — resulting in a substantial verdict for the client. Since there is no true conflict in the circuits on any of the issues raised by petitioner, this case simply involves a disgruntled client seeking to avoid the terms of a properly enforceable contract to which he voluntarily agreed. Nowhere does it appear that Congress intended to preempt the ability of parties to contract. This is a simple breach of contract case, and the district court has not rendered any



judgment for either party on the contested issues. None of petitioner's arguments warrants issuance of a writ of certiorari.

DATED: June 23, 1989.

Respectfully submitted,

MICHAEL R. MITCHELL
*in propria persona*

# APPENDIX A

# CONTINGENT RETAINER AGREEMENT

This Agreement is made at the County of Los Angeles, State of California, effective on September 18, 1985 by and between Juan Francisco Venegas, [home address and phone number omitted] Work: Menes Law Corporation, 1901 Avenue of the Stars, Suite 1240, Century City, CA 90067, Phone (213) 277-4895 ("Client") and MICHAEL R. MITCHELL, 5850 Canoga Avenue, 4th floor, Woodland Hills, CA 91367, Phone (818) 992-1203 ("Attorney") hereinafter sometimes referred to jointly as "the parties."

In consideration for the mutual promises hereinafter set forth the parties agree as follows:

1. Client agrees to retain Attorney to represent Client as Client's Attorney in that certain pending federal civil rights action by Client as plaintiff and Long Beach, California police officers as defendants ("Defendants") in connection with the Client's December 25, 1971 false arrest, trial, conviction and imprisonment for 2 1/2 years in state prison.

2. Attorney agrees to prosecute the lawsuit, now scheduled for trial November 5, 1985, on Client's behalf against Defendants. Client agrees that Attorney is empowered to perform legal services for Client on Client's behalf in said lawsuit and to do all things necessary, appropriate or advisable in connection with Attorney's representation. Client agrees that Attorney is empowered to effect a compromise or settlement in the above-mentioned matter subject to Client's prior authorization. This agreement covers one trial only. In the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of Attorney's employment, but are not obligated to do so.

3. Client hereby expressly authorizes Attorney to allow any accountant employed by Attorney and any

accountant or other person representing the California State Bar and any federal or state taxing authority to inspect and copy records of accounts of Client's funds held in trust by Attorney.

4. Client agrees to pay Attorney a non-refundable retainer fee in the amount of Ten Thousand Dollars ($10,000), payable $5,000 upon execution of this agreement and $5,000 prior to November 5, 1985. Client also agrees to pay Attorney for legal services rendered in connection with the lawsuit, Forty Percent (40%) of the gross amount recovered (prior to any deductions for costs) less the non-refundable retainer fee actually paid. Client understands that Attorney's fee is not set by law but is negotiable between Client and Attorney. Client warrants and represents that Client will hold Attorney harmless from all liens or other claims by any person to all proceeds recovered.

Client initials /s/ J.V.
Attorney initials /s/ MRM

5. Client understands and agrees to pay and advance all necessary costs and expenses incident to the performance of this agreement. It is anticipated that these costs may include, but are not limited to the following: filing fees, service of process fees, trial witness fees, deposition costs, expert witness fees, computerized legal research, travel, and copying costs. Client and Attorney agree that the contingent fee payable to Attorney shall be calculated based on the gross amount recovered prior to any deduction for costs or expenses incurred or advanced.

6. Client hereby gives and grants unto Attorney the right to endorse a check, draft or other instrument for the payment of money in Client's name or on Client's behalf and to retain the share and sums out of the amounts finally received by settlement, judgment or otherwise, in



full for the attorneys fee due to Attorney under this agreement and for any disbursements made by the Attorney for costs and expenses, delivering the balance to Client.

7. Client agrees to cooperate fully with Attorney in all matters relating to Attorney's representation and agrees that failure to cooperate will constitute a breach of this Agreement by Client.

8. Client agrees that Attorney may, at Attorney's election, and at any time, intervene as a party in the action for the sole purpose of protecting Attorney's interest in and to any attorney fee award which may be made by the trial or any appellate court. Client acknowledges that the right to apply for and collect any attorney fee award made by a court is Attorney's and not Client's right. Client understands and agrees that Client has no right to nor shall client attempt to waive or waive Attorney's right to apply for and collect attorney's fees. In consideration for Client's agreements, Attorney agrees that Attorney shall make appropriate applications for attorneys fees in the lawsuit. Attorney and Client agree that to the extent that attorneys fees are awarded and recovered by Attorney, the same shall, dollar-for-dollar, reduce Client's obligation to pay (or shall be refunded to Client if previously paid) attorney fees to Attorney pursuant to Paragraph 4 above. Any attorneys fees awarded by a court in excess of the amount which Client is obligated to pay pursuant to paragraph 4 above is the property of and shall be paid to Attorney.

9. This agreement is binding on the successors, heirs, administrators, executors and trustees of the parties.

Client initials /s/ J.V.
Attorney initials /s/ MRM

10. Client acknowledges that Attorney has advised Client and that Client understands that, should Client not prevail in the lawsuit, Client would be required to pay Defendants' costs of suit, and might possibly be required to pay Defendants' attorney's fees. This agreement is the entire agreement between the parties, and this agreement may not be amended or modified except by a written document signed by both parities. [*sic*] Should any dispute arise respecting rights or obligations under this agreement, the prevailing party shall be entitled to a reasonable attorney's fee.

11. This Agreement shall become effective and binding only upon acceptance by Attorney. Acceptance can only be made by Attorney's affixing his signature below and delivering an original signed copy to Client. Client understands and agrees that Attorney has made no guarantees regarding the successful termination of this matter and that all expressions relative to the outcome are matter of Attorney's opinion only.

DATE: 9-18-85 /s/ Juan F. Venegas
Juan Francisco Venegas ("Client")

DATE: 9-18-85 /s/ Michael R. Mitchell
Michael R. Mitchell ("Attorney")



January 8, 1986

I, Juan Venegas, consent that the Law Offices of Johnnie L. Cochran, Jr associate as my attorney with Michael R. Mitchell in my federal case of *Venegas v. Wagner*, and that said attorneys may share attorney fees on a 50-50 basis.

/s/ Juan F. Venegas

No. 88-1725

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1988

JUAN FRANCISCO VENEGAS,
Petitioner,

vs.

MICHAEL R. MITCHELL,
Respondent.

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STATE OF CALIFORNIA )
) ss:
COUNTY OF LOS ANGELES )

DONALD A. JOHNSON, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the above action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On June 23, 1989, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

MICHAEL S. BROMBERG, ESQ.
BOX 2112, HAMPTON STREET
SAG HARBOR, NY 11963

That affiant makes this service, for MICHAEL R. MITCHELL, *in propria persona*, and that to the best of my knowledge all the persons required to be served in said action have been served.

DONALD A. JOHNSON

On June 23, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared DONALD A. JOHNSON known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Notary Public in and for
said county and state